

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Robert Green Hospitality, LLC

Serial No. 90065535

Daniel M. Cislo of Cislo & Thomas LLP
for Robert Green Hospitality, LLC.

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Before Zervas, Wellington, and Wolfson, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Applicant Robert Green Hospitality, LLC seeks registration on the Principal Register of the standard character mark **LYDIA** for “hotel services, namely, high-end boutique resort hotel services” in International Class 43.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that Applicant’s mark is likely to cause confusion with the

¹ Application Serial No. 90065535; filed July 1, 2020, based on an allegation of bona fide intent to use the mark in commerce, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

registered standard character mark **LIDIA'S KANSAS CITY** (KANSAS CITY disclaimed) for restaurant services in International Class 43.²

After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [or services] and differences in the marks.”). We discuss these factors, and others, below.

² Registration No. 2898860 issued on November 2, 2004 and has been renewed. The registration contains the statement, “The name LIDIA identifies a living individual whose consent is of record.”

A. Alleged Weakness of the Registered Mark

In terms of weakness or strength of a cited mark, the fifth and sixth *DuPont* factors are relevant because they involve, respectively, the strength of the prior mark and the number and nature of similar marks in use on similar goods or services. *See DuPont*, 177 USPQ at 567. Under these factors, we consider the cited mark's inherent strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)."); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

In its brief, Applicant contends that the cited mark, LIDIA'S KANSAS CITY, is weak and merits less protection because "there are many allowed marks and common law and business name uses that have coexisted using the term LYDIA or LIDIAS."³ Any weakness of the cited mark, if it exists, may guide our comparison of the marks.

Applicant relies on the following:⁴

- A list of thirteen (13) trademark registrations and two (2) trademark applications;⁵ all but two of the registrations are owned by the same owner of

³ 7 TTABVue 9.

⁴ Lists provided within the text of Applicant's April 30, 2021 Response, at TSDR pp. 9-20.

⁵ Applications generally have no probative value for purposes of showing weakness and are evidence only of the fact that they have been filed. *Interpayment Serv. Ltd. v. Docters &*

the cited registration.⁶ The two listed registrations not owned by Registrant are: LYDIA HOUSE for “[Class] 42 charitable services, namely, providing food, shelter, and spiritual support for the homeless and less fortunate,” and LYDIAN STONE for “[Class] 32: beer” and “[Class] 43: Restaurant and brew pub services.”

- A list of four (4) purported “state registrations” owned by third parties for the following “Citation[s]”: LYDIA’S LA CANASTA WICKENBERG, LYDIA’S LA CANASTA RESTAURANT, LYDIA’S MEXICAN FOOD, and LYDIA’S CAFE LLC., for restaurants, café or food trailer services.
- A list of twenty-five (25) Internet addresses (URLs) with an “abstract” and the “HTML Title” for hotels or other accommodation establishments with the name Lydia, located throughout the United States and the world.
- A list of fifty-three (53) “businesses that coexist that use the term LYDIA or LIDIA’S that coexist.”

To be clear, Applicant did not provide copies of any third-party trademark registrations or copies of the “state registrations.”⁷ Nor did Applicant submit printouts from any of the listed websites, or any additional evidence regarding the list of businesses.

Third-party registrations may not be made of record by merely listing them in response to an Office Action. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1208.02 (“to make a third-party registration of record, or a registration owned by the applicant or registrant not the subject of the appeal, a copy

Thiede, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003). In any event, as noted, these applications are owned by Registrant.

⁶ Registrant is LGMB Holding LLC, which is the same name provided in the list for eleven of the thirteen listed registrations and the two applications.

⁷ Indeed, Applicant did not submit copies for any of the listed registrations and applications, except for three hard copies of registrations owned by Registrant for the marks TUTTO LIDIA and LIDIA’S ITALY AT HOME. Applicant’s response filed July 26, 2021, TSDR pp. 26-28.

of the registration (from either the electronic records of the Office or the paper USPTO record) showing the current status and title of the registration must be submitted”), and cases cited therein. However, if an applicant provides such a list and the examining attorney does not advise the applicant that the list is insufficient to make the registrations of record at a point when the applicant can correct the error, the examining attorney will be deemed to have waived any objection to consideration of the list itself, for whatever probative value it may have.

Here, the Examining Attorney did not inform Applicant regarding the insufficiency of its third-party registration list.⁸ Accordingly, we consider the list of registrations, but hasten to add that it has little, if any, probative value in terms showing that LYDIA or LIDIA is weak in connection with restaurant services. As mentioned, all but two of the registrations are be owned by Registrant, the owner of the cited registration. Thus, there are only two listed registrations that appear to be owned by third-parties, and even these are not helpful because one is for unrelated charitable services. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (third-party registrations for goods that appear to be in fields which are far removed from the goods at issue are of limited probative value). The other registration is for beer and restaurant services, but is for the dissimilar mark LYDIAN STONE.

The probative value of merely listing registrations, including the four “state registrations,” is also lacking because there is no way to confirm whether the

⁸ Indeed, in the Office Action issued on June 1, 2021, the Examining Attorney noted the list of registrations, as well as the list of “state registrations,” and discussed their relevance.

registrations are valid and existing, or if the marks are in use on a commercial scale so that the public has become familiar with them. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office). *See also Allstate Insur. Co. v. DeLibro*, 6 USPQ2d 1220, 1223 (TTAB 1988) (state registrations have little, if any, probative value on the question of likelihood of confusion); *In re Hub Distributing, Inc.*, 218 USPQ 284, 285 (TTAB 1983). As for the two listed third-party registrations of marks using LIDIA or LIDIA'S, registrations alone do not show that the marks are in use. Even if they did, they are so few in number as to carry little weight and do not demonstrate that the cited mark is weak and should be afforded a narrow scope of protection. *Cf. Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) ("voluminous" and "extensive" evidence of at least fourteen relevant third-party uses or registrations of record); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (at least twenty-six relevant third-party uses or registrations of record).

Similarly, we are not persuaded that Registrant's mark is weak based on Applicant's list of "URLs/ Abstract/ HTML Title" or its list of "businesses that coexist that use the term LYDIA or LIDIA'S that coexist." Again, Applicant did not provide any corroborating evidence demonstrating that any of these purported websites or businesses are actually in existence and, if so, the manner in which any similar marks are used in connection with the related services. *Aerodyne Dev. Corp. v. Aerodyne*

Mach. Corp., 176 USPQ 94, 95 (TTAB 1972) (listings in a trade name search report were “manifestly insufficient” to show weakness of common term in subject marks “since we have no testimony regarding the fields of trade in which these third parties are engaged.”). Without additional evidence, we cannot determine just from the lists themselves how many companies, if any, render services under marks with the term LYDIA or LIDIA; thus, the lists are not reflective of commercial or marketplace weakness. *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017).

At best, “Lydia” or “Lidia” may be used in business names to indicate an affiliation with a person having the name.⁹ However, the mere fact that a term is a recognized first name does not necessarily mean that it is not an inherently distinctive element in a mark. “A personal name mark, unless it is primarily merely a surname, is registrable on the Principal Register without a showing of secondary meaning, and thus is deemed to be inherently distinctive under the Lanham Act if the record shows that it is used in a manner that would be perceived by purchasers as identifying the

⁹ The record shows an individual named “Lidia Bastianich” is affiliated with Registrant. Applicant’s July 26, 2021 Request for Reconsideration, TSDR p. 24. Registrant’s registrations, including the cited registration, also contain statements that the name LIDIA in the marks identifies “a living individual ... whose consent is made of record.” *Id.* at TSDR pp. 28-30; see also Note 2. As to “Lydia,” while it may be common knowledge, we nonetheless take notice that it is a recognized “female given name.” From Dictionary.Com (www.dictionary.com/browse/lydia), based on THE RANDOM HOUSE UNABRIDGED DICTIONARY, Random House, Inc. 2022. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006) (the Board may take judicial notice of dictionary definitions, including online dictionaries that are based fixed editions).

services in addition to the person.” *Brooks v. Creative Arts By Calloway LLC*, 93 USPQ2d 1823, 1829 (TTAB 2009).

In sum, there is insufficient evidence of record to demonstrate that the cited mark, LIDIA’S KANSAS CITY, is weak for Registrant’s services.

B. Similarity of the Marks

We now consider the *DuPont* factor involving the similarity or dissimilarity of the marks: LYDIA and LIDIA’S KANSAS CITY. In making our comparison, we consider the marks in their entirety in terms of their appearance, sound, connotation and commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005); *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression such that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). Moreover, the focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*,

190 USPQ 106, 108 (TTAB 1975). In this case, the average purchaser is anyone who stays in hotels and dines in restaurants, namely, the general public.

We find the marks are very similar because Applicant's mark is LYDIA, and this is nearly identical to the initial and dominant component of the registered mark, LIDIA'S KANSAS CITY. *Palm Bay Imps.*, 73 USPQ2d 1692 ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word). The difference between LYDIA and LIDIA only reflects a single-letter, spelling variation of essentially the same term. The difference is not very noticeable visually, and does not prevent them from being phonetic equivalents.

In terms of meaning and connotation, both LYDIA and LIDIA'S KANSAS CITY conjure the given name, Lydia or Lidia. Whether consumers understand this name as identifying an individual affiliated with the services, the same meaning will be conveyed. In other words, consumers may believe both marks refer to an individual with the name.

The addition of the disclaimed geographic term, KANSAS CITY, in the registered mark does very little to distinguish the marks. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018) (geographically descriptive and disclaimed term ascribed less weight in the likelihood of confusion determination) (citing *Bd. of Regents, Univ. of Tex. Sys. v. S. Ill. Miners, LLC*, 110 USPQ2d 1182, 1188 (TTAB

2014) (“[I]t is well-settled that disclaimed, geographically descriptive matter, such as the wording SOUTHERN ILLINOIS, may have less significance in likelihood of confusion determinations.”) and *Tea Bd. of India*, 80 USPQ2d 1899 (“Geographically descriptive terms are generally regarded as inherently weak and entitled to less protection than arbitrary or suggestive marks.”)) This is particularly so in relation to the involved services, i.e., hotels and restaurants, because these are the types of services that may be rendered in multiple locations. Thus, the addition of a particular geographic location in one mark for hotel or restaurant services is likely to be understood as referring to a hotel or restaurant in that one particular location, versus other geographic locations that same business may have.

For these reasons, we find the marks are overall similar in appearance, sound, and meaning. This factor weighs in favor of finding a likelihood of confusion.

C. The Services, Channels of Trade and Classes of Consumers

As to the second and third *DuPont* factors, we consider, respectively, the similarity or dissimilarity of Applicant’s and Registrant’s services and the “established, likely-to-continue channels of trade” for these services. *DuPont*, 177 USPQ at 567. *See also In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018). For both factors, we must base our analyses on the services as they are described in Applicant’s application and the cited registration. *See also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *In re Dixie Rests.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Insofar as the services are concerned, it is not necessary that they be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective services are related in some manner, and/or that the conditions and activities surrounding the marketing of the services are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same source. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). Put differently, the issue is not whether purchasers would confuse the services, but rather whether there is a likelihood of confusion as to the source of the services. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984).

The Examining Attorney argues that Applicant's high-end boutique hotel services are "highly related" to Registrant's restaurant services.¹⁰ In support, he submitted Internet evidence showing approximately twenty hotels, including some described as "boutique" or "luxury" hotels, that advertise restaurants at the same location or offer food service within the hotel.¹¹ Two of these advertise the hotel and restaurant services under the same mark:

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¹¹ Printouts attached to Office Actions issued on November 4, 2020, June 1, 2021, and March 23, 2022.

The Cosmopolitan Hotel and Restaurant (San Diego, California)¹²



- and -

The Lennox Hotel (Miami, Florida)¹³



The majority of the evidence, however, shows hotels with restaurants at the same location or within the hotel, albeit with a different name for the restaurant. For

¹² Office Action issued November 4, 2020, at TSDR p. 7. Other hotels with restaurant services include The Jefferson and The Lennox; The Jefferson (also has Lemaire restaurant),

¹³ Office Action issued March 23, 2022, at TSDR p. 12.

example:

The Washington Plaza (Washington, D.C.)¹⁴

THE WASHINGTON PLAZA

Experience the Modern Feel of Our Historic Washington, DC Hotel

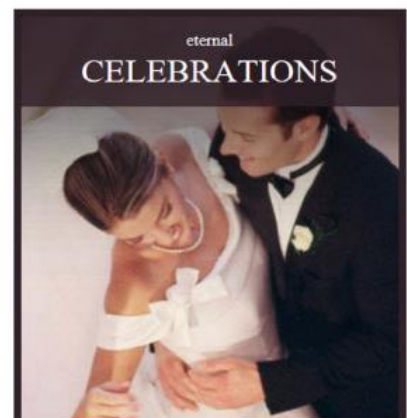
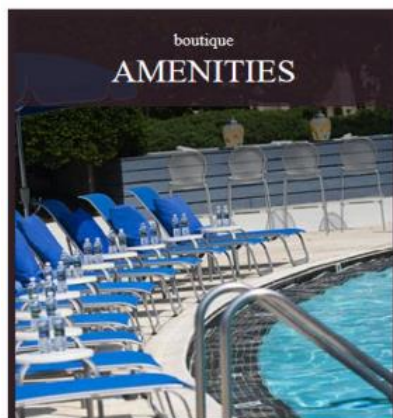
Discover the modern elegance of the newly-renovated Washington Plaza. A balance of cosmopolitan sophistication and casual grace, our resort-like hotel offers spacious, boutique accommodations in an ideal location setting. Located downtown on Thomas Circle, our hotel sits in the city's trendiest neighborhood, and is only minutes from the iconic attractions of the Nation's Capital. Lounge by our beautifully-landscaped pool, a design highlight of the hotel's world-famous architect, Morris Lapidus. Enjoy innovative American fare dining at 10 Thomas Restaurant, a favorite of both guests and discerning DC residents, or plan your next business meeting or wedding in our 12,000 sq. ft. of flexible meeting space, immersed in the stylish ambiance of our boutique hotel.

CHECK IN: 3:00 PM

CHECK OUT: 12:00 PM

340 ROOMS

FREE WI-FI



Our Innovative American Cuisine Restaurant

The restaurant at the Washington Plaza has something for everyone to enjoy - from steak and

Our energetic Thomas Circle restaurant serves innovative American cuisine, including light, h
and fabulous salads and desserts. Because we use locally grown ingredients, our menu changes

- and -

¹⁴ Office Action issued June 1, 2021, at TSDR pp. 3-8. The small print in the first excerpted image includes a description of the hotel as “resort-like” and offering “boutique accommodations,” while also advertising “innovative American fare dining at 10 Thomas Restaurant, a favorite for both guests and discerning DC residents.”

Keswick Hall (Keswick, Virginia)¹⁵



Although the restaurants operate under a different name from the hotels, the evidence reflects a strong hotel-restaurant affiliation, if not co-ownership, with the restaurant being described as belonging to or associated with the hotel. For example, the Keswick Hall hotel website excerpt (above) informs, “[g]uests and the local community are invited to ... enjoy an incredible meal in **our** casually elegant ambiance,” and, in the previous website excerpt, The Washington Plaza describes the restaurant as “[**o**]ur energetic Thomas Circle restaurant.” Emphasis added.

To further demonstrate a relationship between hotel and restaurant services, the Examining Attorney introduced ten third-party, use-based registrations for marks covering restaurant services and hotel services.¹⁶ “Third-party registrations which

¹⁵ Office Action issued March 23, 2021, at TSDR p. 9. The small print includes a description of the hotel as “sophisticated boutique,” with a restaurant called “Marigold” on the premises for “guests and the local community.”

¹⁶ Office Action issued June 1, 2021, at TSDR pp. 76-102.

cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source.” *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant disputes the relevance of the evidence submitted by the Examining Attorney. Specifically, as to the Internet evidence, Applicant argues that it “is not unusual that hotels have restaurants, but there is no evidence to show that all (or even some) hotels have restaurants with the same name as the hotel,” and that “[o]n balance, the evidence shows that most of the time, the hotel has restaurants with unique names that differ from the hotel name”¹⁷ Applicant asserts that “the analysis of whether marketing channels overlap includes a determination of whether the parties’ customer bases overlap, and how the parties advertise and market their products,” but goes on to state that “the fact that hotels often have restaurants is not sufficient to establish that the services are related.”¹⁸ Applicant also contends that the “web screen shots [submitted by the Examining Attorney] provide that parties offering hotel services are likely to market their services for lodging by describing the

¹⁷ 7 TTABVUE 8.

¹⁸ *Id.* at 8-9.

location, room offerings, rates, and dining, and further inquiry into dining reveals outlets bearing unique names.”¹⁹

Applicant is correct that, as already discussed, and as the Internet evidence indicates, restaurants within hotels are generally, but not always, advertised under a different name from that of the hotel. However, this does not mean the services are unrelated. To the contrary, the Internet evidence establishes that hotel services, including boutique-style hotels like Applicant’s, and restaurant services, such as Registrant’s, are offered together through the same hotel websites, and therefore travel in at least one of the same trade channels to the same classes of consumers, who include members of the general public. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203-04 (TTAB 2009) (internet evidence shows overlapping trade channels). Indeed, the evidence shows that hotel and restaurant services are complementary and offered to the same classes of purchasers. Specifically, hotels advertise and emphasize the importance and convenience of being able to dine within the same establishment. In addition, the third-party registration evidence helps show that hotel and restaurant services may emanate from a common source under a single mark – and, as discussed above, the Internet corroborates that some hotels do advertise these services under the same mark.

In sum, we find that hotel services, including boutique or resort hotels, are related to restaurant services. These services are complementary, and will be offered in the same trade channels to the same classes of purchasers. These factors therefore also

¹⁹ *Id.* at 9.

weigh heavily in favor of finding a likelihood of confusion.

D. Conclusion

Because the marks are overall similar, the services are related and are offered in the same trade channels to the general public, confusion is likely.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.